IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5322 of 2007
with
CIVIL APPLICATION No.5437 OF 2007
in
SPECIAL CIVIL APPLICATION No. 5322 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KESHAVLAL DHARSHIBHAI WILL TRUST & 2 - Petitioner(s)
Versus
HEIRS OF DECD. RUXMANIBEN NAGARDAS & 1 - Respondent(s)

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Appearance :
MR JA ADESHRA for Petitioner(s) : 1 - 3.
MR SP MAJMUDAR for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI

Date : 18/04/2007

ORAL JUDGMENT

At the joint request of the learned advocates the

matter is taken up for final hearing.

2. **Rule**. Mr.S.P. Majmudar, learned advocate waives service of rule. Present petition is filed by the original plaintiffs being aggrieved by order passed below exh.63 in Regular Civil Suit No.277 of 2004 which was granted by the learned Judge by order under challenge dated 07.02.2007. The learned 5th Additional Senior Civil Judge, Surendranagar was pleased to grant exh.63 after taking into consideration the objections filed vide exh.64.

3. In normal circumstances an application praying for appointment of Court Commissioner for a report to be made by the Commissioner is a welcome step, but in the present case the application is not bona fide and it smacks of mala fides. The suit was filed in the year 2004 by the landlord seeking possession of the property on three grounds, viz.

(i) alteration of permanent structure,

(ii) acquisition of alternative accommodation by the tenant, and

(iii)non user of the premises.

4. It so happened that in the year 2005 application, exh.16 dated 19.09.2005 was filed by landlord requesting the Court to allow him to amend the plaint by adding the fourth ground, i.e. 'change of user'. It is the case of the landlord-plaintiff-petitioner herein that after having come to know that one of the grounds on which possession is sought for by the landlord is 'non user', the tenant started using the premises, but not for residential purpose. The application of the landlord, exh.16 was allowed by order dated 11.10.2005.

5. It is thereafter that application, exh.63 was filed on 12.12.2006, which is allowed by order dated 07.02.2007. Application, Exh.63 is filed after lapse of more than a year after filing of exh.16, which was filed 19.09.2005 and was allowed on 11.10.2005, by which tenant came to know about the new ground of 'change of user'. If the 'bona fides' of the tenant were clear he would have immediately filed an application for appointment of Court Commissioner to get necessary evidence on record. The tenant waited for a long and filed application for appointment of Court Commissioner only on 12.12.2006.

6. The learned Judge while allowing exh.63 has observed

that, 'the parties can prove their case by other evidence'. That being so there was no necessity to allow the application for appointment of Court Commissioner, more particularly, when it was specifically objected by filing objections vide exh.64 stating that, 'the application is filed only with a view to create evidence'.

7. It is true that the order, prima facie, appears to be innocuous, but when it is examined in light of the aforesaid discussion, the application is found to be devoid of bona fides. Therefore, the order passed by the learned Judge, i.e. learned 5th Additional Senior Civil Judge, Surendranagar dated 07.02.2007 is hereby quashed and set aside. Rule is made absolute. No order as to cost.

8. In view of the order passed in Special Civil Application No.5322 of 2007, no orders on Civil Application No.5437 of 2007. The same is disposed of.

(RAVI R. TRIPATHI, J.)

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